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Medical Monitoring: A Viable Remedy for Deserving Plaintiffs or Tort Law's Most Expensive Consolation Prize?

Arvin Maskin

Konrad L. Cailteux

Joanne M. McLaren

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**MEDICAL MONITORING: A VIABLE REMEDY FOR
DESERVING PLAINTIFFS OR TORT LAW'S MOST
EXPENSIVE CONSOLATION PRIZE?**

Arvin Maskin, Konrad L. Cailteux and Joanne M. McLaren[†]

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I. INTRODUCTION

In the products liability and toxic tort arena, plaintiffs often face exceedingly difficult evidentiary obstacles in their quest to prove that defendants' conduct proximately caused their injuries. Toxic chemicals or defective pharmaceuticals may not cause a signature disease, thus leaving plaintiffs with the burden of proving that their disease was caused by defendants' product, and not some other material or product to which they were exposed. The long latency period of many toxic substances requires plaintiffs to estab-

[†] Arvin Maskin is a Partner, Konrad L. Cailteux is Of Counsel, and Joanne M. McLaren is an Associate at Weil, Gotshal & Manges LLP in New York, New York, where they specialize in products liability, mass tort and complex litigation.

lish a causal connection between the onset of illness and defendants' conduct of perhaps several decades in the past.¹ Such massive time lapses obviously make facts harder to gather, witnesses more likely to be unavailable, and any causal chain intuitively more tenuous.

Reacting to these realities, plaintiffs have sought, and courts have created, less traditional causes of action or remedies, which ease plaintiffs' burden of proof. One such example is the claim for medical monitoring expenses. Courts have shown increased receptivity to medical monitoring claims, and plaintiffs have reacted by routinely seeking medical monitoring costs. Indeed, a medical monitoring claim appears to have become an almost inevitable feature of any cause of action arising from chemical exposure or allegedly defective pharmaceutical or medical products.²

A claim for medical monitoring expenses is intended to finance diagnostic examinations for presently healthy plaintiffs who have been exposed to a toxic substance, in the hope that early detection and treatment of the disease will be beneficial.³ Generally, plaintiffs need not prove that they are presently injured, or even that they will likely sustain an injury in the future. Rather, in order to prevail, plaintiffs must only demonstrate that the defendants' conduct exposed them to a substance which increased their risk of adverse health effects, that a diagnostic test exists which can detect the disease, and that treatment is available for the disease of which onset is feared.

With its lower standards of proof, a medical monitoring award often represents plaintiffs' strongest chance of success. Thus, in future cases involving toxic chemicals, pharmaceuticals or medical devices, we should expect to see such claims whenever a colorable argument of their necessity can be advanced.

1. For example, the average latency periods for various carcinogenic substances are: arsenic, 25 years; tar, 20-24 years; radiation, 20-30 years; and asbestos, 18 years. Allan T. Slagel, *Medical Surveillance Damages: A Solution to the Inadequate Compensation of Toxic Tort Victims*, 63 IND. L. J. 849, 852 n.15 (1988) (citing 5B *Lawyers' Medical Encyclopedia of Personal Injuries and Allied Specialties*, § 38.46h (3d ed. 1986)).

2. E.g., *In re Diet Drugs Prods. Liab. Litig.*, No. 98-20626, 1999 U.S. Dist. LEXIS 13228, at *3 (E.D. Pa. Aug. 26, 1999) (discussing medical costs from exposure to diet drugs); *Day v. NLO*, 851 F. Supp. 869, 876 (S.D. Ohio 1994) (discussing medical costs from exposure to radiation); *Bower v. Westinghouse Elec. Co.*, 522 S.E.2d 424, 427 (W. Va. 1999) (discussing medical costs from exposure to light bulbs).

3. *Ayers v. Jackson Township*, 525 A.2d 287, 308 (N.J. 1987).

II. THE HISTORICAL DEVELOPMENT OF MEDICAL MONITORING AWARDS

The origins of medical monitoring awards can be traced back to *Friends for All Children v. Lockheed Aircraft Corp.*,⁴ where they were first permitted, albeit in a highly regulated manner. The *Friends* action was brought on behalf of a group of 149 Vietnamese orphans who had survived the decompression and crash of the Lockheed aircraft transporting them from Saigon to the United States, where they were to meet their adoptive parents.⁵ An organization, Friends for All Children, held itself out as the legal guardian of the survivors, and sought the costs of the diagnostic testing which it claimed the children would need to determine whether or not they were suffering from neurological disorders.⁶

The district court granted plaintiffs partial summary judgment on the issue of defendant's liability for the crash, and ordered Lockheed to create a fund from which the diagnostic expenses plaintiffs sought could be disbursed.⁷ On appeal, the court first addressed whether or not the District of Columbia would permit a cause of action for diagnostic examinations notwithstanding the absence of proof of present injury.⁸ The court concluded that such a cause of action was viable, providing an analogy, which has since been used by many courts as a shorthand justification for medical monitoring costs, absent injury:⁹

Jones is knocked down by a motorbike which Smith is riding through a red light. Jones lands on his head with some force. Understandably shaken, Jones enters a hospital where doctors recommend that he undergo a battery of tests to determine whether he has suffered any internal head injuries. The tests prove negative, but Jones sues Smith solely for what turns out to be the substantial cost of the diagnostic examinations.

From our example, it is clear that even in the ab-

4. 746 F.2d 816, 824-28 (D.C. Cir. 1984).

5. *Id.* at 819-20.

6. *Id.*

7. *Id.* at 820, 822.

8. *Id.* at 824-25.

9. *E.g., Friends*, 746 F.2d 816, 825 (D.C. Cir. 1984); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 977-78 (Utah 1993) (approving *Friends* analysis); *Bower*, 522 S.E.2d at 430 (approving *Friends* analysis); *Day*, 851 F. Supp. at 880 (citing *Friends* hypothetical).

sence of physical injury Jones ought to be able to recover the cost for the various diagnostic examinations proximately caused by Smith's negligent action. A cause of action allowing recovery for the expense of diagnostic examinations recommended by competent physicians will, in theory, deter misconduct, whether it be negligent motorbike riding or negligent aircraft manufacture. . . . The motorbike rider, through his negligence, caused the plaintiff, in the opinion of medical experts, to need specific medical services—at a cost that is neither inconsequential nor of a kind that the community generally accepts as part of the wear and tear of daily life. Under these principles of tort law, the motorbiker should pay.¹⁰

The court affirmed the decision below, finding that the irreparable injury that may befall plaintiffs outweighed the danger of hardship to defendant.¹¹ Indeed, the district court had placed several important checks on the fund, to minimize hardship to Lockheed, and to verify that the funds were used for legitimate purposes.¹² Most importantly, a voucher system was envisioned, whereby a child's guardian would submit a voucher delineating expenses incurred, at which time Lockheed could object to reimbursement for the procedure undergone.¹³ A science panel, consisting of professionals such as psychologists, psychiatrists and neurologists, was to provide input as to what future testing a child should undergo.¹⁴ A doctor was to review each patient's medical records, to determine which tests the child had already undergone, thus ensuring that defendant would not be required to pay for redundant testing.¹⁵

Significantly, relief was awarded only to the French plaintiffs, the district court finding that the public health systems of all the other countries where plaintiffs resided would pay for any medical examinations required.¹⁶ Thus, the district court refused to permit recovery to those who would incur no out-of-pocket expenses.¹⁷

10. *Friends*, 746 F.2d at 825.

11. *Id.* at 826-27.

12. *Id.* at 823.

13. *Id.*

14. *Id.*

15. *Id.* at 835 & n.34.

16. *Friends for All Children v. Lockheed Aircraft Corp.*, 746 F.2d 816, 822 n.7 (D.C. Cir. 1984).

17. *Id.*

Furthermore, the fund proceeds were to be placed in an interest-bearing account, and after completion of the examinations, all money not expended was to be returned to Lockheed.¹⁸

Although *Friends* was not a products liability or toxic tort case, it did not take long for the rationale presented therein to be extended to the products liability and toxic tort context. In the seminal case of *Ayers v. Jackson Township*,¹⁹ plaintiffs brought suit after consuming well water contaminated by toxic pollutants leaching from a landfill operated by the township.²⁰ A jury awarded the plaintiff class over \$8 million to cover future costs of diagnostic testing for cancer and other diseases that plaintiffs allegedly were at increased risk of contracting as a result of the exposure.²¹

On appeal, the Appellate Division concluded that the scientific evidence could not "rule out the probability that such increase is so microscopically small as to be meaningless."²² Thus, the court set aside the medical monitoring award, holding that, "Without some quantifying guidance [as to increased risk], it becomes impossible to say that defendant has so significantly increased the 'reasonable probability' that any of the plaintiffs will develop cancer so as to justify imposing upon defendant the financial burden of lifetime medical surveillance...."²³

The New Jersey Supreme Court reinstated the award, finding that diagnostic testing may be medically necessary, and thus compensable, even where plaintiffs' risk of disease is only slightly higher than for the general population,²⁴ setting the stage for the explosion of medical monitoring cases which would follow in recent years.

III. ARGUMENTS FOR MEDICAL MONITORING DAMAGES

Building on *Friends* and *Ayers*, plaintiffs have asserted, and many courts have permitted, medical monitoring claims, a trend, which shows no signs of abating. And, the pragmatic and financial incentives to plaintiffs' attorneys to bring these claims virtually en-

18. *Id.* at 823 n.10.

19. 525 A.2d 287 (N.J. 1987).

20. *Id.* at 290.

21. *Id.*

22. *Ayers v. Jackson Township*, 493 A.2d 1314, 1323 (N.J. Super. Ct. App. Div. 1985).

23. *Id.* (citing *Coll v. Sherry*, 148 A.2d 481 (N.J. 1959)).

24. *Ayers*, 525 A.2d at 298, 312-13.

sure that the tide of medical monitoring claims will continue to swell. Plaintiffs have advanced, and most assuredly will continue to advance, a variety of public policy arguments favoring such awards. For example, plaintiffs seeking recognition of a medical monitoring remedy have cited the unfairness of requiring plaintiffs to bear the costs of medical diagnostic examinations which, but for the defendant's actions, they would not be compelled to undergo.²⁵ This rationale obviously assumes that plaintiffs do indeed incur the expenses associated with medical monitoring, and loses its initial intuitive appeal if many plaintiffs choose not to seek medical attention in the wake of their exposure.

Plaintiffs also argue that advancing them the funds for obtaining medical diagnosis furthers an important public health objective.²⁶ Many people may not be able to afford such tests, the foregoing of which may lead to their discovery of an illness too late to take advantage of treatment which could potentially save their lives or mitigate the severity of their illness.²⁷

Plaintiffs further argue that requiring defendants to pay the costs of anticipated medical monitoring may serve an important deterrent function.²⁸ Often, products liability and toxic tort plaintiffs may be unable to prove that defendants' conduct caused them injury.²⁹ Long latency periods between exposure to a product and the onset of illness increase the likelihood that defendants will have left the pertinent market, material evidence will have vanished, witnesses died, or memories lapsed. Furthermore, the longer the latency period, the more likely that plaintiffs will have exercised other lifestyle or occupational choices that arguably could have contributed to their illness, rendering a verdict against the defen-

25. *E.g.*, *Hansen*, 858 P.2d at 976 (noting that diagnostic examinations can be expensive, and acknowledging the injustice of imposing such a financial burden on plaintiffs exposed as a result of another's negligence); *Ayers*, 525 A.2d at 312 (stating that requiring plaintiffs, wrongfully exposed to toxic substances, to pay their own medical expenses, is "inequitable").

26. *Ayers*, 525 A.2d at 311 (recognizing that medical monitoring damages are "manifestly consistent with the public health interest in early detection and treatment of disease.").

27. *Hansen*, 858 P.2d at 976.

28. *E.g.*, *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 852 (3d Cir. 1990), *cert. denied sub nom.* Gen. Elec. Co. v. Knight, 499 U.S. 961 (1991) ("[a]llowing plaintiffs to recover the cost of this care deters irresponsible discharge of toxic chemicals by defendants"), *quoted with approval in Bower*, 522 S.E.2d at 431; *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 824 (Ca. 1993).

29. *E.g.*, *Ayers*, 525 A.2d at 301-303 (acknowledging the many difficulties a plaintiff must overcome to prove causation in a toxic tort case).

dants less likely. For these reasons, plaintiffs assert that the current tort system does not deter defendants who know, even though their product may ultimately cause injury to a class of plaintiffs in the future, they may not be held accountable because of the time lag. Permitting medical monitoring awards upon a more lenient standard of proof provides defendants with an incentive to minimize negligent conduct.³⁰

Closely related to this argument is perhaps the most troubling justification of medical monitoring damages. Some courts and commentators have acknowledged the very real obstacles that products liability and toxic tort plaintiffs face, and subtly suggested that allowing plaintiffs to recover monitoring damages alleviates some of the unfairness felt when their claims for enhanced risk or for any physical injury that later develops fail.³¹ This seems to be an impermissible commingling of disparate causes of action.

Finally, plaintiffs argue that providing for medical monitoring damages may actually prove advantageous to defendants. A plaintiff who undergoes medical surveillance may discover an illness in time to alleviate it, improving his or her prognosis and theoretically reducing the value of any claim he or she may thereafter bring against the defendants.³²

IV. ARGUMENTS AGAINST MEDICAL MONITORING DAMAGES

Theoretically, deterring negligent defendants and ensuring that nobody is denied access to health care because of lack of

30. *Ayers*, 525 A.2d at 312 (suggesting that permitting recovery for medical monitoring expenses may subject polluters to significant liability, when proof of causal connection between plaintiffs' exposure and defendant's tortious conduct is strongest, thus providing a deterrent effect).

31. *Redland Soccer Club, Inc. v. Dept. of the Army*, 696 A.2d 137, 145 (Pa. 1997) (justifying medical monitoring awards which afford "toxic-tort victims, for whom other sorts of recovery may prove difficult, immediate compensation for medical monitoring needed as a result of exposure"); Slagel, *supra* note 1, at 852-53 (commenting that the unlikelihood of a toxic tort plaintiff's recovering in a future action, once injury manifests itself, renders pre-manifestation causes of action more necessary). See also Terry Christovich Gay & Paige Freeman Rosato, *Combating Fear of Future Injury and Medical Monitoring Claims*, 61 DEF. COUNS. J. 554, 557 (1994) (observing that some courts permit medical monitoring awards "as a sort of compromise to those arguably deserving plaintiffs" who are unable to recover under other theories requiring a higher standard of proof).

32. *E.g., Ayers*, 525 A.2d at 312 ("The availability of a substantial remedy before the consequences of the plaintiffs' exposure are manifest may also have the beneficial effect of preventing or mitigating serious future illnesses and thus reduce the overall costs to the responsible parties.").

funds, at a time when early detection could be most beneficial, are noble goals. Nevertheless, several factors have the potential to transform the medical monitoring concept into a redundant or even ill-advised tool in the products liability and toxic tort context. First, medical monitoring may be an entirely redundant remedy for those who already have health insurance. Even assuming that plaintiffs do indeed undergo the diagnostic examinations they purport to seek, any money they recover will be a true windfall for those whose health insurance already covers such costs. Most medical monitoring plaintiffs have no present physical injury. Rather, the injury for which they seek recompense is allegedly the out-of-pocket expenses of reasonable medical monitoring. Where plaintiffs' out-of-pocket expenses are nil, their recovery should be also.³³

Second, the enormity of the universe of potential medical monitoring plaintiffs is another very legitimate concern that should counsel caution in future judicial acceptance of such awards. According to the United States Environmental Protection Agency, billions of pounds of hazardous chemicals are released into the air each year.³⁴ The EPA further reports that nearly 20 percent of the U.S. population (approximately 40 million people) live within four miles of a hazardous waste site on the National Priority List.³⁵ Nationwide, there are approximately 50,000 hazardous waste sites.³⁶ Between five and thirty-eight percent of all incidences of cancer have been traced to workplace exposure to toxic substances.³⁷ It has been estimated that over twenty-one million Americans have experienced significant exposure to asbestos.³⁸ Almost everyone comes into daily contact with second-hand smoke. Medical moni-

33. *Friends*, 746 F.2d at 822 n.7. Allowing recovery for medical monitoring costs where such costs would be covered by health insurance or some other collateral source seems contrary to the teachings of *Friends*, which accorded relief only to those plaintiffs whose public health system would not cover any necessary diagnostic testing. *Id.*

34. Andrew R. Klein, *Rethinking Medical Monitoring*, 64 BROOKLYN L. REV. 1, 13 (Spring 1998) (citing Paul J. Komyatte, *Medical Monitoring Damages: An Evolution of Environmental Tort Law*, 23 COLO. LAW. 1533, 1533 (1994)).

35. *Id.*

36. Leslie S. Gara, *Medical Surveillance Damages: Using Common Sense and the Common Law to Mitigate the Damages Posed by Environmental Hazards*, 12 HARV. ENVTL. L. REV. 265, 265 (1988).

37. *Id.*

38. *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1323 (5th Cir. 1985).

toring claims have been predicated upon exposure to a wide variety of potential hazards including cigarettes,³⁹ landfills,⁴⁰ workplace radiation,⁴¹ PCBs,⁴² termiticides,⁴³ diet drugs,⁴⁴ and contaminated water,⁴⁵ among others. Most people are thus legitimate potential medical monitoring plaintiffs, a clear indication that the boundaries of this potential tort remedy must be narrowly drawn to prevent it spiraling out of control.⁴⁶

Third, the universe of potential medical monitoring plaintiffs seems vastly over-inclusive. For example, one study found that the rate of lung cancer development among shipyard workers exposed to asbestos was about 67 per million per year.⁴⁷ Awarding the costs of diagnostic examinations to one million workers, where only sixty-seven will contract cancer in a given year, may be a grossly inefficient resource allocation. Obviously, we cannot predict with certainty who, among exposed persons, will ultimately contract a disease. For medical monitoring to serve its purpose, we do want to ensure that as many as possible of those who do ultimately contract a disease are given the opportunity to detect it as early as possible to obtain prompt, comprehensive treatment. However, dispensing large awards to those whose chances of illness as a result of a defendant's conduct are small poses the real risk that little or no resources will be available to compensate those who are truly injured,

39. *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 130-31 (3d Cir. 1998), *cert. denied*, 526 U.S. 1114 (1999).

40. *Redland Soccer Club, Inc. v. Dept. of the Army*, 55 F.3d 827, 834 (3d Cir. 1995).

41. *Day*, 851 F. Supp. at 873.

42. *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d at 835.

43. *Villari v. Terminix Int'l, Inc.*, 663 F. Supp. 727, 728 (E.D. Pa. 1987).

44. *In re Diet Drugs Prods. Liab. Litig.*, 1999 U.S. Dist. LEXIS 13228, at *3.

45. *Ayers*, 461 A.2d at 185-86; *Merry v. Westinghouse Elec. Corp.*, 684 F. Supp. 847, 848 (M.D. Pa. 1988); *Potter*, 863 P.2d at 800.

46. The scope of medical monitoring costs in products liability and toxic tort cases is further compounded by the fact that many toxic substances may have the potential to cause a wide variety of different ailments. That is, many substances to which plaintiffs allege exposure do not cause a "signature disease." Exhaustive testing for the future ramifications of the seemingly infinite number of ailments which plaintiffs claim to suffer following their exposure presents defendants with potentially significant liability. For example, in *Hurd v. Monsanto Co.*, 164 F.R.D. 234, 237 (S.D. Ind. 1995), plaintiffs' exposure to PCBs precipitated such diverse complaints as joint pain, skin rashes, high cholesterol, nail fungus, loss of concentration, numbness, endometriosis, headaches, sinus and stomach problems and fear of cancer.

47. *In re Hawaii Fed'l Asbestos Cases*, 734 F. Supp. 1563, 1570 n.10 (D. Haw. 1990) (citing Kolonel, *Cancer Occurrence in Shipyard Workers Exposed to Asbestos in Hawaii*, *CANCER RESEARCH* 45 (Aug. 1985)).

in this case the sixty-seven cancer patients, by the time their injuries manifest themselves.

Finally, permitting medical monitoring damages, as that claim is presently implemented, may presage a dangerous loosening of the causation requirement in more traditional causes of action, and a complete eradication of the causation requirement in the medical monitoring context. That is, in medical monitoring cases, plaintiffs need not prove that their exposure will actually cause a future injury. Rather, they need only prove that the substance to which they were exposed has the *potential* to cause a future injury.⁴⁸ In contrast, plaintiffs suing upon discovering a developed illness must satisfy the more stringent burden of proving that the toxic substance more probably than not *did cause* their injuries.⁴⁹

One commentator has suggested that plaintiffs who recover for medical monitoring damages may be able to benefit from issue preclusion should they later sue for any physical injury that later develops.⁵⁰ It is highly unlikely that any court would subscribe to such an argument. Showing that a substance could cause a disease is simply not the same as demonstrating that it in fact did. Allowing demonstration of the former to substitute for proof of the latter is as inappropriate as predicated a finding of criminal guilt upon a finding of civil liability.

Nevertheless, it seems evident that the loose medical monitoring standard of proof, although not dispositive of traditional physical injury claims, may spill over into traditional tort actions, with courts gradually becoming more accepting of the less demanding standard of proof accompanying medical monitoring claims. For example, although courts fairly consistently prohibit recovery for fear of future illness unless onset of such illness is more probable than not, it is very possible that this requirement will likewise be diluted, and recovery will be permitted for fear-based claims where the feared illness *could* result from the toxic exposure. Such an erosion of tort law's safeguards, if it transpires, may be one of medical monitoring's most dangerous and significant legacies.

48. *Potter*, 863 P.2d at 824 (holding medical monitoring damages appropriate where defendant's conduct has created a significant, but not necessarily likely, risk of serious disease).

49. *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285-86 (2d Cir. 1990).

50. Patricia E. Lin, Note *Opening the Gates to Scientific Evidence in Toxic Exposure Cases: Medical Monitoring and Daubert*, 17 REV. LITIG. 551, 567-68 (Summer 1998).

V. THE BASIC ELEMENTS OF A MEDICAL MONITORING CLAIM

Upon weighing these competing public policy objectives in favor of, and against, medical monitoring awards, the courts of most states that have confronted the issue to date have, under certain circumstances, recognized medical monitoring remedies.⁵¹ Although the precise interpretation of the elements of the cause of action vary from state to state, one court has observed that the various state and federal courts to have permitted medical monitoring claims have moved toward "relative consensus" on the necessary elements.⁵² Most articulations are heavily influenced by the standard set forth in *Ayers*, which held that the cost of medical monitoring is a compensable item of damages where the evidence demonstrates through reliable expert testimony predicated upon the significance and extent of exposure to chemicals, the toxicity of the chemicals, the seriousness of the diseases for which individuals are at risk, the relative increase in the chance of onset of disease in those exposed, and the value of early diagnosis, that such surveillance to monitor the effect of exposure to toxic chemicals is reasonable and necessary.⁵³

For example, the *Hansen* court articulated the following elements a plaintiff must prove to qualify for medical monitoring damages:

- (i) exposure (ii) to a toxic substance (iii) which exposure was caused by the defendant's negligence (iv) resulting in an increased risk (v) of a serious disease, illness or injury (vi) for which a medical test for early detection exists (vii) and for which early detection is beneficial, meaning that a treatment exists that can alter the course of the illness, and (viii) the test has been prescribed by a qualified physician according to contemporary scientific principles.⁵⁴

Although various differences color a state's interpretation of the elements, it seems unlikely that the basic foundation of the cause of action will be shaken by courts facing it for the first time in the future. Nonetheless, courts become more comfortable hearing medical monitoring claims, and as the ramifications of the remedy be-

51. *Potter*, 863 P.2d at 824-25; *Hansen*, 858 P.2d at 979-80; *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 33 (Ariz. Ct. App. 1988), *rev. dismissed*, 781 P.2d 1373 (Ariz. 1989).

52. *Bower*, 522 S.E.2d at 432.

53. *Ayers*, 525 A.2d at 312.

54. *Hansen*, 858 P.2d at 979.

become more apparent, it is inevitable that courts will experiment with varying interpretations of the elements of the claim, in an attempt to achieve a workable balance compensating all those and only those who truly require medical monitoring.

A. *Risk Of Injury*

Most courts hold that, to satisfy the exposure requirement, plaintiffs need not prove that they have a reasonable likelihood of contracting the feared disease for which monitoring is sought.⁵⁵ Rather, the plaintiffs need only prove that the exposure was sufficient to increase their risk, such that medical monitoring is warranted. Courts emphasize that no particular level of quantification of increased risk must be established.⁵⁶ This lack of an articulated minimum threshold is troubling, potentially permitting recovery to plaintiffs whose risks are increased only microscopically.⁵⁷

Requiring that plaintiff's risk be *significantly* increased before recovery is permitted would serve to limit the number of potential claimants, and ensure that trivial claims do not overwhelm the judicial system.⁵⁸ Such an interpretation also appears unavoidable in light of the requirement, imposed by most states, that the testing be medically necessary. For example, in *Ayers*, although the court held that, in order to recover, plaintiffs must demonstrate that the diagnostic examinations sought are "reasonable and necessary,"⁵⁹ it nevertheless reinstated a medical monitoring award of over eight million dollars, despite the Appellate Division's finding that plaintiffs' experts could not rule out the possibility that any increase in risk to plaintiffs' health was "so microscopically small as to be meaningless."⁶⁰ It is difficult to understand how expensive medical moni-

55. *Id.*

56. *Id.*

57. The *Ayers* court permitted recovery of medical monitoring damages, despite the Appellate Division's inability to rule out the probability that plaintiffs' increased risk was so "microscopically small as to be meaningless." 493 A.2d 1314, 1323 (1985).

58. To limit the universe of potential plaintiffs, one commentator argues that only those plaintiffs who can show that toxic exposure has more than doubled that plaintiff's risk of disease should be entitled to recover medical monitoring damages. Klein, *supra* note 34, at 4. Such a proposition would reinvigorate some of the causation requirement that seems to have been written out of the medical monitoring arena.

59. *Ayers*, 525 A.2d at 312.

60. *Id.* at 297.

toring⁶¹ can be a *necessary* response to a potentially microscopically small risk.

An alternative means of screening out spurious claims, and ensuring that medical monitoring damages are available only to those at increased risk of future disease stemming from defendants' conduct, is to require that plaintiffs be suffering from a related injury prior to bringing suit. The majority of courts have chosen not to adopt this limiting mechanism.⁶² Instead, while recognizing that the intervention of the tort system is inappropriate unless plaintiff has been injured,⁶³ those courts conclude that imposing on plaintiffs the costs of necessary medical monitoring constitutes a presently compensable injury.⁶⁴

Other courts state that plaintiffs must demonstrate a present physical injury to recover medical monitoring damages.⁶⁵ Nevertheless, in applying this principle, many appear to eviscerate any meaningful distinction between injury and mere exposure. Thus, the court in *Askey v. Occidental Chemical Corporation*⁶⁶ purported to require present injury, but defined injury as "the invasion of the body by the foreign substance, with the assumption being that the substance acts immediately upon the body setting in motion the

61. Plaintiffs in *Ayers* received an average of \$24,921 for medical monitoring, with awards ranging from \$3,500 to \$37,500. Slagel, *supra* note 1, at 869 n.129.

62. *Burton v. R.J. Reynolds Tobacco Co.*, 884 F. Supp. 1515, 1522-23 (D. Kan. 1995); *Burns*, 752 P.2d at 33.

63. *E.g.*, *Redland Soccer Club*, 55 F.3d at 846 n.8 (citing *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1136 (5th Cir. 1985)) ("An actionable tort, whether based on negligence or strict liability consists of two elements: a failure to act in accordance with the standard of care required by law and a resultant injury...However egregious the legal fault, there is no cause of action for negligence...until there is 'actual loss or damage resulting to the interests of another.'").

64. *Ayers*, 525 A.2d at 304 ("The invasion for which redress is sought is the fact that plaintiffs have been advised to spend money for medical tests, a cost they would not have incurred absent their exposure to toxic chemicals."); *see also Friends*, 746 F.2d at 826 ("It is difficult to dispute that an individual has an interest in avoiding expensive diagnostic examinations just as he or she has an interest in avoiding physical injury."); *Hansen*, 858 P.2d at 977 ("Although the physical manifestations of an injury may not appear for years, the reality is that many of those exposed have suffered some legal detriment; the exposure itself and the concomitant need for medical testing constitute the injury.").

65. *Bowerman v. United Illuminating*, No. X04CV 940115436S, 1998 Conn. Super. LEXIS 3575, at *7-14 (Conn. Super. Dec. 15, 1998) (noting that a claim for medical monitoring expenses does not stand alone, and refusing to award such expenses to plaintiffs exposed to asbestos in the absence of proof of some actionable physical injury).

66. 477 N.Y.S.2d 242 (N.Y. App. Div. 1984).

forces which eventually result in disease" ⁶⁷ Similarly, in *Werlein v. United States*,⁶⁸ the court found that "chromosomal breakage, and damage to the cardiovascular and immunal systems" may suffice to constitute injury.⁶⁹

Whatever route they take, it is imperative that courts remedy this deficiency in future cases, and impose some more stringent requirement⁷⁰ on the risk plaintiffs must show to recover medical monitoring damages. That is the only way to ensure that truly deserving plaintiffs recover, and to increase the likelihood that future funds will be available to compensate those who ultimately contract a disease stemming from defendants' conduct.

B. Test Must Be Reasonably Medically Necessary

Most courts require plaintiffs to demonstrate that a reasonable physician in the appropriate medical specialty would recommend the monitoring regime they seek.⁷¹ Courts have generally allowed physicians to take into account such practical considerations as the burdensome frequency of the testing, its excessive price and the risk of harm to the plaintiff in determining whether or not the testing would be recommended.⁷² Defendants seeking to mitigate their liability for medical monitoring damages thus strive to present, through expert testimony, both that the testing sought may not be helpful, and that it may indeed be harmful.

As the tide of medical monitoring claims continues, which seems inevitable, defendants must be prepared in future cases to put plaintiffs to their proof, requiring that they demonstrate that the diagnostic testing they seek does indeed have the potential to improve their prognosis. Some commentators have observed a judicial bias that early detection is beneficial.⁷³ Whether early detec-

67. *Id.* at 247 (citations omitted).

68. 746 F. Supp. 887 (D. Minn. 1990), *vacated as moot*, 793 F. Supp. 898 (D. Minn. 1992) (parties subsequently settled action).

69. *Id.* at 901.

70. For example, plaintiffs could be required to prove that their risk of injury has been significantly increased, or that it is more probable than not that the feared disease will actually result.

71. *E.g.*, *Carey v. Kerr-McGee Chem. Co.*, 999 F. Supp. 1109, 1120 (N.D. Ill. 1998) (medical monitoring must be shown to be necessary "to a reasonable degree of medical certainty").

72. *Hansen*, 858 P.2d at 980.

73. *E.g.*, *Slagel*, *supra* note 1, at 867 ("courts will probably continue to assume that early detection is beneficial").

tion is of benefit, at least for some severe illnesses, is subject to considerable disagreement. One court for example, has concluded that, "[d]elay in treatment almost invariably results in a more serious prognosis."⁷⁴ Others find little benefit in early detection, observing that the survival rate of cancer patients "has not increased appreciably in the past forty years, despite improvements in both diagnostic acumen and therapeutic skills."⁷⁵

Clearly the value of early detection will be almost exclusively dependent on the nature of the disease for which diagnosis is sought. Courts in future cases cannot be allowed to rely on judicial bias that early diagnosis necessarily improves treatment. Both plaintiffs and defendants have an obligation to thoroughly explore the medical literature, to present the most comprehensive study of the efficacy or inefficacy of early diagnosis of the diseases for which plaintiffs fear increased risk.⁷⁶ For example, in *Redland Soccer Club*,⁷⁷ the plaintiffs' expert acknowledged the limitations of current medical screening devices, commenting that the risks of some, such as lung cancer screening, outweigh the potential benefits.⁷⁸ Such factors are appropriate to consider. Being required to pay the cost of medical monitoring they will be forced to undergo is allegedly the injury that gives plaintiffs standing to sue. Where plaintiffs are unlikely to sustain that injury, because the testing is too burdensome or dangerous, plaintiffs have no present injury for which to be recompensed.

West Virginia, however, recently branched out from the path of "relative consensus" on this issue, expressly permitting courts to take the subjective concerns of the plaintiff into account in determining what tests are reasonably advisable.⁷⁹ Thus, plaintiffs in West Virginia courts can recover for prohibitively expensive diag-

74. *Evers v. Dollinger*, 471 A.2d 405, 409 n.4 (N.J. 1984); see also *Bower*, 522 S.E.2d at 431 (noting the value of early diagnosis for many cancer patients).

75. Slagel, *supra* note 1, at 868 n.118 (citing Parver, *Defense of Delayed Diagnosis and Treatment of Breast Cancer*, 30 MED. TRIAL Q. 34, 36-37 (1983)).

76. *Id.* at 869 n.121 (noting that defendants have argued almost exclusively that medical monitoring damages should not be awarded in the absence of present physical injury, to the exclusion of other arguments, such as the inefficacy of early diagnosis).

77. 55 F.3d 827 (3d Cir. 1995).

78. *Id.* at 848.

79. *Bower*, 522 S.E.2d at 433 ("[T]he requirement that diagnostic testing must be medically advisable does not necessarily preclude the situation where such a determination is based, at least in part, upon the subjective desires of a plaintiff for information concerning the state of his or her health").

nostic testing that a doctor would not ordinarily recommend, and are then free to spend the money on other purposes, merely because they express unassauged fears about their future health. This dilutes the medical monitoring standard too far, hopelessly confounding it with the fear-of-future-illness cause of action. The medical monitoring remedy is designed to reimburse plaintiffs for reasonable medical diagnostic examinations—what is or is not reasonable should be ascertained by an expert with appropriate medical knowledge, uninfluenced by a plaintiff with no medical experience.

C. Testing Must Be Different Than Prudent Person Would Ordinarily Undergo

Before defendants should be required to pay for medical monitoring, plaintiffs must demonstrate that the need for medical monitoring is fairly traceable to defendants' conduct. Thus, defendants should not be required to pay for screening recommended for the general population even in the absence of exposure to defendants' toxic substance,⁸⁰ or for screening recommended in light of plaintiffs' pre-existing conditions.⁸¹

Both of these considerations are highly fact dependent and require thorough analysis of the available medical proof. In one recent case⁸² defendants presented an expert who opined that the only types of cancers for which screening tests may be beneficial are cervical, colon and breast cancer.⁸³ The expert further stated that no evidence suggested that plaintiffs' exposure to radiation had increased their risk of cervical cancer, therefore such screening should not be deemed medically advisable for these particular plaintiffs.⁸⁴ Further, according to this expert, all individuals are encouraged to receive screening for colon cancer, regardless of radiation exposure and breast cancer screening is routinely recommended for all women over forty.⁸⁵ Thus, according to defendants, no medical screening procedures were available for plaintiffs that were not recommended for the population as a whole.⁸⁶ Although

80. *Potter*, 863 P.2d at 825.

81. *Id.* at 826.

82. *Carey*, 60 F. Supp. 2d at 811-12.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

the court found sufficient questions of fact on the propriety of medical monitoring to deny defendants' motion for summary judgment, this case provides an illustration of the analysis of what testing, illness-by-illness, is generally recommended, in which plaintiffs and defendants litigating medical monitoring claims must engage.⁸⁷

A similar analysis must be undertaken with respect to testing which is already medically required by plaintiffs' pre-existing conditions or personal risk factors, such as smoking. Just as defendants have not caused plaintiffs any out-of-pocket loss if the testing plaintiffs seek is recommended for the general population even in the absence of exposure, so have defendants caused no additional out-of-pocket loss if such testing would be recommended anyway based on plaintiffs' personal health and risk factors. The paucity of discussion on this element in the reported cases suggests that this potentially important avenue is vastly underutilized by defendants, and could be a potent weapon in future cases. For example, the defendants in *Potter* asserted this defense, successfully arguing that they should not be responsible for the costs of medical monitoring that plaintiffs' own lifestyle choices made reasonably necessary.⁸⁸

All *Potter* plaintiffs were long-time cigarette smokers, seeking medical monitoring damages for their exposure to contaminated water, despite the fact that cigarette smoke was found to contain approximately 2,500 times the benzene concentration of the contaminated water.⁸⁹ It seems that the *Potter* plaintiffs' fears of future disease from the contaminated water were perhaps fuelled by the fact that this was a risk they had not elected to take, which they did not fully understand, whereas the risks from smoking may have seemed less frightening because it was a risk which the plaintiffs had chosen, and could, to some degree, control.

Defendants should be able to effectively demonstrate to juries that such attitudes do not comport with common sense or the scientific evidence, and minimize recovery for risks which are miniscule in comparison with risks which plaintiffs already willingly run.

87. *Carey*, 60 F. Supp. 2d at 811-13; see also *Barnes*, 161 F.3d at 155 (granting summary judgment against plaintiff smoker, because the regular physical examinations and cardiovascular risk assessments she sought are part of a normally prescribed regime, even absent cigarette exposure).

88. *Potter*, 863 P.2d at 826 n.31.

89. *Id.* at 825.

D. Early Diagnosis Must Be Beneficial

The majority of states explicitly require that a plaintiff demonstrate that early diagnosis will be beneficial.⁹⁰ One commentator, approving of this requirement, aptly noted that where no treatment currently exists, "early diagnosis merely lengthens the time over which a person knows he suffers from the disease, but does nothing to alter the natural history of the condition, or the ultimate fatality."⁹¹ One court added the more stringent requirement that not only must treatment be available, but treatment must be more efficacious if administered early, before the disease becomes obvious.⁹² Otherwise, "there is no cause of action because medical monitoring cannot fulfill its purpose."⁹³

In this respect also, the recent West Virginia decision, *Bower v. Westinghouse Electric Corporation*,⁹⁴ abandons this prevailing view, permitting recovery of medical monitoring damages even where no treatment is available for the disease for which the plaintiff seeks monitoring.⁹⁵ The *Bower* court provided two principal rationales for its decision. First, the constant advances of medical science swayed the court.⁹⁶ Just because a treatment regimen is not presently available does not mean that one will not become available within the plaintiff's lifetime.⁹⁷ For this reason, the court expressed unwillingness to be constrained by the "static requirement" that treatment be presently available.⁹⁸ While the *Bower* court is correct to acknowledge that medical science is continually breaking new frontiers, surely the preferred judicial response to this is to allow a plaintiff, who fears he or she will contract a disease for which no treatment currently exists, to sue for surveillance damages if and when a treatment becomes available.

Courts have expressed willingness to entertain medical

90. E.g., *Hansen*, 858 P.2d at 979 (stating that plaintiff must show that a treatment exists that can alter the course of the illness); *Potter*, 863 P.2d at 825 (noting that courts must take into account the clinical value of early detection and diagnosis).

91. George W.C. McCarter, *Medical Sue-Veillance: A History and Critique of the Medical Monitoring Remedy in Toxic Tort Litigation*, 45 RUTGERS L. REV. 227, 280 (Winter 1993) (citing Michael Alderson, OCCUPATIONAL CANCER 182 (1986)).

92. *Hansen*, 858 P.2d at 979-80.

93. *Id.* at 980.

94. 522 S.E.2d 424 (W. Va. 1999).

95. *Id.* at 432-34.

96. *Id.*

97. *Id.* at 434.

98. *Id.* at 433-34.

monitoring suits, presently barred because no diagnostic testing is available, if such testing is later developed.⁹⁹ The *Bower* court appeared not to consider such a course where testing is available but where no treatment currently exists. *Bower* seems to have identified a legitimate issue but chosen the wrong solution.

Requiring defendants to subsidize monitoring for an illness for which treatment *may* become available will inevitably mean that defendants will end up paying for monitoring for illnesses for which treatment *does not* become available, a gross waste of resources. Rather than indiscriminately awarding damages in the hope that treatment is later developed, courts addressing this issue in the future should only permit plaintiffs to bring a medical monitoring suit if and when a treatment is developed.

More interestingly, the *Bower* court justified its decision that even where no treatment exists, plaintiffs should nevertheless be entitled to damages, because:

One thing that...a plaintiff might gain [even in the absence of available treatment] is certainty as to his fate, whatever it might be. If a plaintiff has been placed at an increased risk for a latent disease through exposure to a hazardous substance, absent medical monitoring, he must live each day with the uncertainty of whether the disease is present in his body. If, however, he is able to take advantage of medical monitoring and the monitoring detects no evidence of disease, then, at least for the time being, the plaintiff can receive the comfort of peace of mind. Moreover, even if medical monitoring did detect evidence of an irreversible and untreatable disease, the plaintiff might still achieve some peace of mind through this knowledge by getting his financial affairs in order, making lifestyle changes, and, even perhaps, making peace with estranged loved ones or with his religion. Certainly, these options should be available to the innocent plaintiff who finds himself at an increased risk for a serious latent disease through no fault of his own.¹⁰⁰

99. *Hansen*, 858 P.2d at 979 n.12 (noting that plaintiffs, for whom no diagnostic test is currently available, have the right to sue for medical monitoring when such testing becomes available in the future, provided the other elements of the cause of action are met).

100. *Bower*, 522 S.E.2d at 434 (citing *Bourgeois v. A.P. Green Indus., Inc.*, 716 So. 2d 355, 363 (La. 1998) (Calogero, C.J., concurring)).

The *Bower* court is certainly anomalous in permitting recovery in the absence of a currently available treatment for the feared disease. Because such an approach is so clearly inconsistent with the articulated goals of medical monitoring, courts in future cases should not follow the lead *Bower* offers.

Medical monitoring is intended to provide plaintiffs with an opportunity to seek treatment for diseases where early detection may be beneficial. Where no treatment exists, early detection simply is of no benefit. The alleged benefits identified by the *Bower* court of making peace with loved ones and religion are spurious at best. Most people do not have the luxury, if indeed it is one, of knowing with precision when they are going to die. Allowing plaintiffs this highly questionable luxury would put them in a position that it is likely they would not have enjoyed but for their medical monitoring award, seemingly at unfair expense to defendants. Refusing medical monitoring expenses where no treatment exists seems to be a fairly logical way to limit potentially huge awards to plaintiff classes while still providing medical examinations to those for whom they would be beneficial.

VI. POTENTIAL FOR ABUSE IN THE AWARD OF LUMP SUM MEDICAL MONITORING DAMAGES

Where a fact-finder has determined that plaintiffs merit medical monitoring relief, two principal methods exist to structure the award. Plaintiffs may be awarded traditional damages, representing the anticipated costs of medical tests that an expert deems to be reasonably medically necessary. Alternatively, a court may establish a fund, administered either by the court or an independent agency, from which plaintiffs may seek reimbursement for testing they can prove they underwent. Medical monitoring funds, as opposed to lump-sum awards, are becoming more common, both because of a growing judicial recognition that the fund mechanism is less susceptible to abuse than lump-sum damages, and because class certification may be appropriate only where injunctive relief is sought.

Defendants in future cases should vigorously contest the award of lump-sum damages, the disadvantages of which are evident. Most plaintiffs seeking medical surveillance costs are not currently suffering from any diagnosable disease resulting from defendants' conduct. Otherwise, they would generally be seeking compensation for the disease itself, rather than the more meager costs of detecting it. The incentive for healthy plaintiffs to carefully hoard

their award, and faithfully spend it on periodic medical examinations to detect an illness they will in all likelihood never contract, seems negligible.¹⁰¹ The far more enticing alternative, in most cases, will be to put the money towards a new home, car or vacation. Visiting a physician is not something many people wish they could afford to do more often.

Indeed, that lump sum medical monitoring awards are unlikely to be used for their intended purpose seems to be one lesson we can draw from *Ayers*.¹⁰² One commentator, critical of the theoretical prudence of medical monitoring awards, contacted several dozen of the *Ayers* plaintiffs, who had shared in the \$8,204,500 medical monitoring award.¹⁰³ Only three responded to a questionnaire probing the uses to which they had put their award.¹⁰⁴ The exceedingly small sample size obviously reduces the ability to extrapolate from the study, but the findings are intuitive: One plaintiff spent his award on a new house, and none of the three reported seeing a physician any more frequently than they had before their lawsuit.¹⁰⁵

Other compelling anecdotal evidence lends support to the notion that presently healthy plaintiffs are unlikely to spend medical monitoring awards on their intended purposes. In *Hansen v. Mountain Fuel Supply Co.*,¹⁰⁶ plaintiffs sought medical monitoring costs following workplace exposure to asbestos.¹⁰⁷ Almost seven years after learning of their exposure, plaintiffs had submitted to only preliminary examinations, revealing no illness traceable to their exposure, but otherwise had undergone no further medical testing.¹⁰⁸ The fact that none had undergone testing over a period of almost seven years casts grave suspicion over their assertions that they would use any medical monitoring sums awarded for their stated

101. Klein, *supra* note 34, at 24-25. As one commentator points out, logic dictates that the risk that plaintiff will spend a medical monitoring award on something other than medical monitoring increases as his or her enhanced risk decreases.

102. Klein, *supra* note 34, at 25 n.111 (citing 2 ALI ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 379 n.59 (1991)), wherein ALI reporters concluded that the plaintiffs in *Ayers* ultimately spent their medical monitoring awards on other unintended purposes).

103. McCarter, *supra* note 91, at 258 n.158.

104. *Id.*

105. *Id.*

106. 858 P.2d 970 (Utah 1993).

107. *Id.* at 972-73.

108. *Id.* at 973.

purpose.¹⁰⁹ Although it is conceivable that plaintiffs' lack of testing was attributable to their financial inability to pay for such tests, or perhaps to the long latency period of asbestos-related diseases, it is at least as likely that plaintiffs were less than concerned about medical monitoring, and any such damages awarded to them would have been a windfall.¹¹⁰

Similarly, one commentator¹¹¹ offers several representative excerpts of cross-examination testimony in which toxic tort plaintiffs, seeking medical monitoring damages, were questioned about the extent to which they had availed themselves of medical monitoring opportunities to which they already had access.¹¹² Many had taken little initiative to utilize what monitoring opportunities were already available to them. For example, several of the plaintiffs had consulted their physician on numerous matters preceding the trial, but had never mentioned the dioxin exposure for which they now sought monitoring. Another plaintiff received free physical examinations at his workplace but never sought an examination tailored to his dioxin exposure.¹¹³

Plaintiffs who choose not to avail themselves of medical examinations before trial are highly unlikely to spend any damages they receive on medical monitoring. Careful cross-examination on the diagnostic examinations and medical care available to plaintiffs, and the extent to which they have availed themselves of such care, should thus be a critical element of any defense strategy in future cases.

In response to these concerns, many courts have expressed a preference for equitable remedies as opposed to traditional damage awards,¹¹⁴ a trend which seems likely to continue. In *Hansen*,

109. *Id.*

110. *Id.* at 982.

111. McCarter, *supra* note 91, at 257-58 & n.158.

112. *Id.*

113. McCarter, *supra* note 91, at 270-71 & n.212.

114. *E.g., Day*, 851 F. Supp. at 886 ("The use of the Courts [sic] injunctive powers to oversee and direct medical surveillance is vastly superior to a lump sum monetary payment.") (citation omitted); *Bower*, 522 S.E.2d at 434 ("While there are situations where utilization of such [medical monitoring] funds may be beneficial, we do not presently see a need to constrain the discretion of the trial courts to fashion appropriate remedies in cases such as these.") (citation omitted); *Ayers*, 525 A.2d at 313-14 ("[T]he use of court-supervised funds . . . rather than lump-sum verdicts, may provide a more efficient mechanism for compensating plaintiffs.") ("Although there may be administrative and procedural questions in the establishment and operation of [a medical monitoring fund], we encourage its use by trial courts in managing mass-exposure cases.").

the court took the logical next step and prohibited the award of medical monitoring damages, payable in a lump-sum or otherwise.¹¹⁵ Rather, *Hansen* announced that courts must fashion an equitable remedy, such as requiring the defendant to establish a trust fund, from which diagnostic expenses can be drawn, or pay for insurance to cover plaintiffs' future medical monitoring expenses.¹¹⁶

The approach advocated by *Hansen* seems correct and should be adopted more frequently by courts attempting to curb the potential for abuse in the medical monitoring context. Appropriate equitable remedies provide all the advantages of traditional damages, are the more economically efficient of the two primary alternatives, and are in better harmony with the purported goals of the cause of action. For example, establishing a medical monitoring fund furthers the public health objective, encouraging plaintiffs to safeguard their health by denying them the temptation to spend the money in other ways.¹¹⁷ Furthermore, a fund provides deterrence, but not over-deterrence, as a defendant is required to provide compensation only for diagnostic examinations to which plaintiffs actually submitted.¹¹⁸ And, such a remedy eliminates windfall awards, as plaintiffs do not receive "reimbursement" for expenses they did not incur, or which were covered by a collateral source, such as health insurance. Additionally, an equitable remedy serves to narrow the pool of potential plaintiffs, as only those sufficiently concerned about the ramifications of their exposure obtain relief.¹¹⁹

As more and more plaintiffs seek medical monitoring damages, courts need to be aware of the real possibility that the remedy they fashion will require defendants to pay for medical expenses that in all likelihood will never be incurred. Limiting recovery to a medical fund is an appropriate way for courts to take the interests of both plaintiffs and defendants into account.

115. *Hansen*, 858 P.2d at 982.

116. *Id.*

117. *Ayers*, 525 A.2d at 314.

118. *E.g.*, Day, 851 F. Supp. at 886-87 (observing that medical monitoring funds serve to limit liability of defendants to expenses actually incurred).

119. McCarter, *supra* note 91, at 255-56 (noting two public policy considerations: "(1) a person will not lightly submit to such [medical monitoring] procedures and so should not be lightly compensated for them, and (2) when such procedures are indeed 'medically necessary', a person should be encouraged to undergo them, despite the associated risk and inconvenience"). The author concludes that awarding traditional monetary damages in medical monitoring cases ignores both truths. *Id.*

The realities of the class action mechanism may further serve to shift the focus of medical monitoring to equitable as opposed to traditional legal remedies. Federal Rule of Civil Procedure 23 governs class certification in federal courts. Under that rule, a party seeking class certification must satisfy all four prerequisites of Rule 23(a)¹²⁰ and any one of the subparts of Rule 23(b). Early toxic tort class actions predominantly sought certification under 23(b)(3),¹²¹ under which the putative class must show that issues of fact and law common to the class predominate over issues affecting only individual class members, and that the proposed class action is superior to other available methods for the fair and efficient adjudication of the controversy.¹²² The burdens of Rule 23(b)(3) cannot easily be met in the toxic tort and products liability context where individual issues abound.¹²³ Plaintiffs' prior health history, degree, type and duration of exposure, and personal risk factors such as smoking and prior occupational exposure raise individualized issues.¹²⁴

120. Fed. R. Civ. P. 23(a) (1998) (requiring that a party seeking certification demonstrate that: 1) the class is so numerous that the joinder of all members is impracticable; 2) there are questions of law or fact common to the class; 3) the claims or defenses of the representative parties are typical of those of the class; and 4) the class representatives will fairly and adequately protect the interests of the class).

121. Charles W. Schwartz & Lewis C. Sutherland, *Toxic Tort Symposium: Class Certification for Environmental and Toxic Tort Claims*, 10 TUL. ENVTL. L.J. 187, 192 (Summer 1997).

122. Fed. R. Civ. P. 23(b)(3) (1998).

123. Indeed, the 1966 Advisory Committee Notes clarifying Rule 23(b)(3) expressed the view that the class action device was not encouraged in mass tort cases. Fed. R. Civ. P. 23(b)(3) Advisory Committee Notes (1966) ("A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.") (citations omitted).

124. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 591 (1997) (affirming refusal to certify class of asbestos plaintiffs where plaintiffs had been exposed to different products in different ways for different time periods, with different health ramifications); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1081 (6th Cir. 1996) (decertifying class of penile prosthesis recipients, where plaintiffs received different products and experienced different ailments); *In re Tetracycline Cases*, 107 F.R.D. 719, 730, & 733-36 (W.D. Mo. 1985) (holding differences in chemical composition of the drug ingested, knowledge of prescribing physician and reason for taking the medication precluded class certification, even under 23(c)(4)(A), whereby a class action may be maintained with respect to discrete issues); see also *Baker v. Wyeth-Ayerst Labs. Div.*, 992 S.W.2d 797, 801 (Ark. 1999) (affirming denial of certification of class of diet-drug users, under state class action rule, where plaintiffs had

Similarly, defendants' conduct and the state-of-the-art generally will have changed over time, detracting from common issues where plaintiffs were exposed over a period of time, rather than in one discrete incident.¹²⁵

In *Amchem Products, Inc. v. Windsor*,¹²⁶ the Supreme Court addressed the propriety of certification of a class containing potentially "hundreds of thousands, perhaps millions" of people exposed to asbestos either occupationally or through occupational exposure of a family member, and spouses or family members of such persons.¹²⁷ Affirming the Third Circuit's refusal to certify this "sprawling" class,¹²⁸ the Court adopted much of the Third Circuit's analysis of the predominance requirement, in a decision, which will have far-reaching implications for mass tort cases in the future:

Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Several class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma...Each has a different history of cigarette smoking, a factor that complicates the causation inquiry.

The [exposure-only] plaintiffs especially share little in common, either with each other or with the presently injured class members. It is unclear whether they will contract asbestos-related disease and, if so, what disease each will suffer. They will also incur different medical expenses because their monitoring and treatment will depend on singular circumstances and individual medical histories.¹²⁹

different prior medical histories, the drugs were prescribed by different doctors, with differing knowledge of the drugs' risks, plaintiffs themselves had differing knowledge of the risks, and took the drug for different durations, in different combinations, causing different physical symptoms).

125. *But see* Yslava v. Hughes Aircraft Co., 845 F. Supp. 705, 711-13 (D. Ariz. 1993) (certifying medical monitoring class under Rule 23(b)(2) but noting that class certification under 23(b)(3) would also have been appropriate, finding that differences in the amount of allegedly contaminated water consumed by each plaintiff, changing water distribution patterns, variations in defendant's conduct over time and plaintiffs' individual medical histories did not defeat commonality).

126. 521 U.S. 591, 591 (1997).

127. *Id.* at 591.

128. *Id.* at 594.

129. *Id.* at 624 (citation omitted).

Although the *Amchem* Court acknowledged that "mass tort cases arising from a common cause or disaster may, depending on the circumstances, satisfy the predominance requirement,"¹³⁰ it is clear that 23(b)(3) is an avenue which has been closed to many future mass-tort plaintiffs.

In response, many plaintiffs have recast their medical monitoring claims, seeking to bring them within the purview of Rule 23(b)(2), which permits class certification where all four requirements of Rule 23(a) are satisfied, and "the party opposing the class action has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole".¹³¹ Rule 23(b)(2) does not require that plaintiffs meet the predominance and superiority standards, which may make 23(b)(2) a more viable option for toxic tort plaintiffs seeking class status for medical monitoring claims.¹³² Certification may not be granted under this subpart where "the appropriate final relief relates exclusively or predominantly to money damages."¹³³ Thus, whether a class can be maintained under Fed. R. Civ. P. 23(b)(2) requires close examination of the remedy sought. "When 'the realities of the litigation' demonstrate that the suit has been brought primarily for money damages, it may not be maintained as a (b)(2) class action."¹³⁴ Clearly, a traditional monetary award, approximating the cost of reasonably necessary medical examinations, cannot support a 23(b)(2) class. Where plaintiffs seek establishment of a medical monitoring fund, however, some have been willing to categorize the relief requested as injunctive,¹³⁵ such that a 23(b)(2)

130. *Id.* at 625.

131. Fed. R. Civ. P. 23(b)(2).

132. *But see Barnes*, 161 F.3d at 142-43 (observing that while 23(b)(2) class actions have no formal predominance or superiority requirements, they may nevertheless require more cohesiveness than a 23(b)(3) class, because, unlike 23(b)(3) actions, 23(b)(2) has no opt-out provision).

133. Fed. R. Civ. P. Rule 23(b)(2) Advisory Committee Notes.

134. *Gibbs v. E.I. DuPont De Nemours & Co.*, 876 F. Supp. 475, 481 (W.D.N.Y. 1995) (citations omitted).

135. *Id.* (holding that "[a] court-administered fund which goes beyond payment of the costs of monitoring an individual plaintiff's health to establish pooled resources for the early detection and advances in treatment of the disease is injunctive in nature rather than 'predominantly money damages' and therefore is properly certified under Rule 23(b)(2)"); *Day*, 851 F. Supp. at 887 (holding certification under Rule 23(b)(2) proper where plaintiffs sought medical monitoring fund, over defendants' objections that such relief is not injunctive as it simply requires defendants to finance the fund, and therefore is more properly character-

class may be maintained.¹³⁶

Assuming from past experience that many plaintiffs are less than interested in receiving actual diagnostic examinations, but are driven by the lump-sum awards that courts were formerly more likely to indulge, it seems that the 23(b)(2) route may present many of the same problems of wastefulness as were manifest under 23(b)(3). That is, if defendants are required to establish a monitoring fund, of which few plaintiffs avail themselves, defendants will incur significant costs,¹³⁷ yet provide few attendant public health benefits, leaving plaintiffs' counsel as the only real winners.

VII. LEGISLATIVE REACTION TO COURT CREATED MEDICAL MONITORING CLAIMS

In response to a Louisiana Supreme Court decision,¹³⁸ holding that recovery for medical monitoring damages was permitted notwithstanding that plaintiffs suffered from no present physical injury,¹³⁹ the Louisiana legislature passed a statute requiring physical injury as an essential element of a medical monitoring claim.¹⁴⁰ Such a course is in sharp contrast with the pronounced trend which dispenses with the physical injury requirement.¹⁴¹ Indeed, requiring proof that plaintiff presently suffers from an exposure-related injury seems contrary to the underpinnings of the remedy, which was designed to provide presently healthy plaintiffs with the opportunity of early diagnosis of a disease from which they, as yet, do not suffer.¹⁴² Such a requirement imposes upon plaintiffs the

ized as a request for damages).

136. Other courts have disagreed, however, and refused to certify a 23(b)(2) medical monitoring class under 23(b)(2). For example, in *Thomas v. FAG Bearings Corp.*, 846 F. Supp. 1400, 1404 (W.D. Mo. 1994), the court disregarded plaintiffs' attempts to "couch such [medical monitoring] damages in the guise of injunctive relief" and determined that the remedy plaintiffs sought was nothing more than an exchange of money. Accordingly, class certification under 23(b)(2) was denied.

137. Although waste may be minimized by returning unused monies to the defendant after the expiration of the fund, this procedure may not always be followed as courts have considerable flexibility over the implementation and mechanics of a medical monitoring fund. Moreover, even if unused funds are returned to defendants, defendants will nevertheless have been deprived of their use for the duration of the fund.

138. *Bourgeois v. A.P. Green Indus. Inc.*, 716 So. 2d 355 (La. 1998).

139. *Id.* at 361-62.

140. LA. CIV. CODE. ART. 2315 (2000).

141. *Bower*, 522 S.E.2d at 429-30; *Potter*, 863 P.2d at 825.

142. *Bocook v. Ashland Oil Co.*, 819 F. Supp. 530, 538 (S.D. W. Va. 1993). The

burdensome expenses of financing their own medical monitoring costs unless or until they exhibit physical symptoms, an injustice which the cause of action was intended to remedy. Moreover, by the time a plaintiff suffers from a physical injury, such that he or she can bring suit, medical monitoring may be moot.¹⁴³

Nevertheless, the Louisiana statute provides an interesting example of one method society may use in the future to rein in medical monitoring claims if the courts relax the causation requirement too much. It is unlikely, however, that most jurisdictions will resuscitate the physical injury requirement, because it is contrary to the underlying rationale of medical monitoring. Moreover, it remains to be seen whether such a statute will have any real impact. It is entirely possible that the physical injury requirement will be so loosely interpreted as to encompass mere exposure.¹⁴⁴

The real import of the Louisiana statute lies in its example of a swift, clear legislative response to curb the scope of the medical monitoring remedy, in an attempt to compensate only those with truly meritorious claims. It is likely that other states will seek to achieve a similar objective legislatively, whether or not they use the same means.

VIII. CONCLUSION

Clearly, the medical monitoring remedy arose from a noble goal—that of ensuring that financial hardship does not deprive plaintiffs facing enhanced risk of disease because of a defendant's negligence, of the means of detecting and treating at its early stages

court stated

[T]his court cannot discern the purpose for requiring a plaintiff to also be seeking compensation for present manifest physical injuries. The very essence of toxic exposure cases is the contention that physical injuries therefrom are presently indiscernible; instead the facts are latent. To require a plaintiff to assert a potentially nonviable claim to recover for such presently indiscernible injuries in order to be able to assert a claim for future medical monitoring would amount to elevating form over substance.

143. Medical monitoring may be beneficial, even after an injury has already been detected, in cases where the injury plaintiff has incurred is indicative of increased risk of a discrete disease for which monitoring is available. For example, a plaintiff exhibiting pleural thickening may still benefit from monitoring for asbestosis or mesothelioma. By the time plaintiff has detected symptoms of many other diseases, however, medical surveillance may be of little or no value.

144. *Askey v. Occidental Chem. Corp.*, 477 N.Y.S.2d 242, 247 (N.Y. App. Div. 1984), *Werlein v. United States*, 746 F. Supp. 887, 901 (D. Minn. 1990), *vacated in part* by 793 F. Supp. 898 (D. Minn. 1992).

a serious disease. Nevertheless, the cause of action has spread far from its initial carefully-limited roots, and now threatens to become so liberally interpreted as to be universal.

Whereas *Friends* permitted medical monitoring costs for a discrete class of plaintiffs, the size of which was immediately ascertainable, arising from a single incident which was likely to be the proximate cause of any physical injury sustained by plaintiffs immediately thereafter, courts now permit such claims to be brought by sprawling classes of plaintiffs, whose toxic exposure may be miniscule, and whose alleged injuries, if any, could be the result of a host of variables other than exposure to defendants' products. Moreover, while *Friends* established a medical monitoring fund to ensure that defendants paid only for tests, which were actually administered, recent decisions have transformed the remedy into a consolation prize for plaintiffs for whom success under traditional tort theories is unlikely, and indiscriminately given significant monetary awards to be spent with no strings attached. Finally, *Friends* provided compensation only for those plaintiffs whose medical expenses would not already be covered by a collateral source. Recent decisions have not inquired into plaintiffs' health insurance coverage, or the availability of workplace diagnostic testing, allowing plaintiffs to be "reimbursed" for expenses never incurred.

Abandoning medical monitoring is not the answer. Properly regulated, medical monitoring awards can mean the difference between life and serious illness or death to truly meritorious plaintiffs. However, future courts must continue to struggle to ensure that truly deserving plaintiffs, and *only* truly deserving plaintiffs, may partake of the medical monitoring remedy. Courts should grow more comfortable enforcing more stringent requirements, such as demanding that plaintiffs show *significant* exposure and a *significantly* increased risk of disease. For diseases where no treatment is presently available, recompense should be flatly denied, as monitoring would do nothing to improve plaintiffs' prognoses.

Legislative narrowing of the remedy should be expected and encouraged where courts demonstrate excessive liberality. Both plaintiffs and defendants must come to grips with the often-underdeveloped scientific evidence pertaining to risk of disease and treatment options, and vigorously work to identify those for whom the chance of disease is sufficiently enhanced that medical monitoring is truly medically necessary. Otherwise, the medical

monitoring claim will degenerate into tort law's most expensive consolation prize.